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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

1998 Biennial Regulatory Review -- Review of  
the Commission's Broadcast Ownership Rules  
and Other Rules Adopted Pursuant to Section  
202 of the Telecommunications Act of 1996.

MM Docket No. 98-35

To: The Commission

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COMMENTS OF CUMULUS MEDIA INC.

Cumulus Media Inc. ("Cumulus"), by its attorneys and pursuant to  
Section 1.415 of the Commission's Rules, hereby respectfully submits these Comments  
in response to the Commission's *Notice of Inquiry* in this proceeding ("*NOI*"), FCC 98-  
37, adopted March 12, 1998 and released March 13, 1998, 13 FCC Rcd \_\_\_\_, 63  
Fed. Reg. 15353 (published March 31, 1998). <sup>1/</sup>

<sup>1/</sup> These Comments are timely filed, in accordance with the revised schedule for  
submitting Comments in this proceeding that was adopted in the *Order* in this  
proceeding, DA 98-854, adopted and released May 7, 1998, 13 FCC Rcd \_\_\_\_, 63  
Fed. Reg. 26758 (published May 14, 1998).

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## **Summary**

In these Comments, Cumulus draws the Commission's attention to the recent practice in the Mass Media Bureau (the "Bureau") of deferring action upon applications for Commission consent to the assignment of licenses for commercial AM and FM radio broadcasting stations or to the transfer of control of corporations holding such licenses. These deferred applications comply with the numerical limits upon the maximum number of such stations that a single entity may own or control within a local radio market, as set forth in Section 202(b) of the Telecommunications Act of 1996 (the "Telcom Act") and in Section 73.3555(a)(1) of the Commission's Rules. These deferred applications do not require any waiver of any other Commission rule or policy, are not opposed by any party, and under ordinary circumstances, would be expected to be granted within seven to nine weeks of their filing. However, the Bureau is withholding action upon many of these applications, on the grounds that the Bureau apparently has concerns about whether the acquiring entity would own too large a percentage of the radio station revenues in the pertinent market, post-acquisition, based upon market and station revenue estimates reported in a publication of BIA Research, Inc. ("BIA").

Cumulus argues in these Comments that before the Commission can proceed from the *NOI* in this proceeding to a *Notice of Proposed Rule Making*, the Bureau's errant practice of deferring action upon applications in the aforementioned category must be corrected. Cumulus demonstrates that the Bureau's practice is lacking in statutory authority. Indeed, Section 202(b) of the Telcom Act clearly limits the Commission's review of local-market radio station ownership consolidation to the numbers of station in the market and the numbers of stations owned or to be acquired by the acquiring entity. The thrust of the statute, and its legislative history, clearly preclude the Commission from engaging in examination of market shares of revenues.

Cumulus next demonstrates in these Comments how radio station ownership consolidation in the smaller and mid-sized markets in which Cumulus operates and has sought to enter has positively benefitted both competition and the public interest by enriching the radio station programming for the listener while broadening and enhancing the choice of available media for the advertiser.

Lastly, Cumulus shows in these Comments that any concerns relative to competition among and between radio stations in local markets should be left by the Commission to the expert antitrust agencies, the Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC").

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## **Introduction**

Cumulus, through subsidiaries, owns approximately 94 commercial AM and FM radio broadcasting stations throughout the United States. Cumulus provides programming, sales, and other services to another 24 such stations pursuant to "local marketing" or "time brokerage" agreements, and has applied to the Commission for the Commission's consents to acquire an additional 84 such stations. According to the "Who Owns What" publication, compiled by Inside Radio, Inc. based upon information provided by BIA, as of July 13, 1998 Cumulus, through its subsidiaries, qualified as the fourth-largest owner of stations in the country, ranked by numbers of stations owned.

As a large, national radio broadcasting company, Cumulus has a high level of interest in the *NOI*'s inquiry into the possible launching of a rule making proceeding that would examine certain aspects of the Commission's local radio ownership rule.<sup>2/</sup> *NOI*, at Paras. 17-23. In these Comments, Cumulus will confine itself to those rules. But, Cumulus respectfully submits, before the Commission should consider progressing from the *NOI* in this proceeding to a *Notice of Proposed Rule Making* to adopt new or amended rules in this area, the Commission must first correct a

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<sup>2/</sup> The Commission's local radio ownership rule is found at 47 C.F.R. § 73.3555(a)(1).

serious problem that has recently developed with respect to the Commission's staff's processing of applications for Commission consent to assign radio station licenses or to transfer control of corporations holding such licenses.

Specifically, Cumulus wishes to call the Commission's attention to a recent initiative -- apparently adopted within the Mass Media Bureau and apparently without any formal input by all of the Commissioners or their offices -- whereby pending applications for the Commission's consent to acquire one or more stations are deferred on account of staff concerns that the acquiring entity would possess an allegedly "excessive" percentage of the radio station revenues in a given market, based solely upon market and station revenue estimates reported in a BIA publication.<sup>3/</sup> Such deferrals are occurring under circumstances where the applications propose an ownership configuration that conforms to the numerical limits of Section 202(b) of the Telecom Act, Pub. L. No. 104-104, 110 Stat. 56 (1996), and Section 73.3555(a)(1), and where the

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<sup>3/</sup> As the Commission is aware, BIA itself has recognized in the context of several recent assignment applications that its estimates of revenues for "home market" stations often overstate the revenue shares of such stations due to several factors, including (i) discrepancies between BIA estimates and actual audited revenues, (ii) omissions of revenue estimates for some home-market stations, and (iii) omissions of in-market generated revenues by out-of-market stations with reportable audience shares in the home market. In addition, of course, it is well recognized by the federal antitrust agencies that market shares alone are not an accurate or complete indicator of actual effects on competition. *See generally DOJ-FTC Horizontal Merger Guidelines* §§ 2-4 (rev. 1997); Address by Joel I. Klein, Acting Assistant Attorney General, U.S. Department of Justice, "DOJ Analysis of Radio Mergers," Feb. 19, 1997.

applications do not request any waivers of any Commission rule or policy and are not the subject of any petitions to deny, informal objections, or other oppositional filings, and therefore would ordinarily be expected to be routinely granted by the Bureau's staff.

Cumulus believes that it has been victimized on a number of occasions by the aforementioned Bureau initiative . . . which, incidentally, remains largely covert (in the sense that the Commission has not issued any published announcement of the same). In a number of currently-pending transactions, Cumulus and its selling parties have been forced to wait for months <sup>4/</sup> while the Commission reportedly works toward either adopting a formal policy or rule in conformance with the Administrative Procedures Act, 5 U.S.C. Sections 551, *et seq.*, or abandoning the initiative altogether. Acquisition transactions that were structured in good faith by Cumulus and its selling parties -- and only after assurance from qualified engineering consultants that the numerical limits of Sections 202(b) of the Telcom Act and 73.3555(a)(1) would not be violated -- are put on indefinite "hold," creating uncertainty at the affected stations

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<sup>4/</sup> See, e.g., File Nos. BAL-980218GF, *et al.*, a pending application for the Commission's consent to the voluntary assignment of the licenses for WFAU (AM) in Gardiner, Maine, *et al.*, from Tryon-Seacoast Communications, Inc. to a subsidiary of Cumulus. Five stations are involved in the application, which was submitted to the Commission on February 18, 1998; conforms to Section 202(b) of the Telcom Act and Section 73.3555(a)(1) of the Commission's Rules; does not require any waivers of any other Commission regulation or policy; and has not been opposed by any party. The application is now in its sixth month of "review" by the Bureau.

which can lead to personnel departures, depressed morale, and deteriorated performance.

In these Comments, Cumulus shows that the Commission has no statutory authority to examine concentration of ownership of radio stations within local markets, where such concentration conforms to the numerical limits of Section 202(b) of the Telcom Act. Cumulus will also demonstrate to the Commission that in Cumulus's experience, consolidation of ownership of radio stations in the mid-sized to smaller markets in which Cumulus operates has benefitted the public interest. Cumulus will also show that the Commission should defer to the appropriate expert antitrust enforcement agencies for adjudication of individual cases in which there may be grounds for concern over allegedly excessive shares of market revenues.

**The Commission Lacks Statutory Authority to Withhold Approval of Station Acquisitions that Conform to Section 202(b) of the Telcom Act.**

Section 202(b) of the Telcom Act delineates with precision the number of radio stations a party may own, operate, or control in a local market of a given size. Section 202(b) embodies Congress's judgment as to the proper balancing of the need for appropriate consolidation of media properties and the interests in avoiding undue

concentration of control and maintaining a sufficient diversity of voices, which judgment the Commission is not free to override.

The plain language of Section 202(b) directs the Commission to permit multiple ownership of radio stations in local markets of varying sizes at or under specified numerical station limits, without providing the Commission with any discretion to adopt a stricter station limit or to consider other measures of market concentration such as advertising revenue shares. The statute provides, in relevant part:

The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market. <sup>5/</sup>

Congress chose to approach the issue of local radio ownership diversity by creating tiers of markets in 15-station groups — from the smallest (14 or fewer) to the largest (45 or more) — and by specifying the exact number of commercial radio stations, both overall and in the same service, that any one party would be permitted to own, operate, or control. The language Congress employed — that the Commission "shall revise" its regulations "to provide" this permitted level of ownership — is clearly mandatory, not merely hortatory.

Congress could not have used more precise terms to accomplish its objective. Since the intent of Congress is clear on this issue, "that is the end of the matter;" the Commission "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S.

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<sup>5/</sup> Pub. L. No. 104-104, § 202(b)(1), 110 Stat. 56 (1996). Pursuant to this Congressional direction, the Commission has since implemented these radio ownership limits in its regulations. *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368, 12370-71 (1996) (adopting revisions to 47 C.F.R. § 73.3555(a)(1) that the Commission found were "mandated" by the "specific terms set forth in the legislation").

837, 842-43 (1984); *see also* *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) ("[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in which case the agency has no discretion."); *Iowa Utilities Board v. FCC*, 120 F.3d 753, 796 (8<sup>th</sup> Cir. 1997).

The legislative history of Section 202(b) of the Telcom Act confirms Congress's intent that the Commission implement the statute's specified numerical station limits, rather than engage in a case-by-case evaluation of market concentration based upon extra-statutory considerations. The most compelling evidence of this intent can be found in the prior versions of Section 202(b) that Congress specifically rejected. A provision that would have eliminated all local numerical radio station ownership limits — and that would have expressly authorized the Commission to refuse its consent to a transfer of a radio license if such transfer would result in an "undue concentration of control" or would "harm competition" — was included in the Senate bill, but the Conference Committee deleted that provision from the final version of the Act. *See* 142 Cong. Rec. 13, H1121 (1996), *reprinted in* 1996 U.S.C.C.A.N 10, 174.

Specifically, Section 207(b)(2) of the Senate bill would have provided,  
in relevant part:

The Commission shall modify its rules set forth in 47 CFR 73.3555 by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity either nationally or in a particular market. The Commission may refuse to approve the transfer or issuance of an AM or FM broadcast license to a particular entity if it finds that the entity would thereby obtain an undue concentration of control or would thereby harm competition. <sup>6/</sup>

The fact that Congress considered, but refused to enact, a provision permitting a case-by-case approach confirms that no such approach was envisioned for the Commission's implementation of Section 202(b). <sup>7/</sup> In no markets did Congress

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<sup>6/</sup> S. 652, 104th Cong., 1<sup>st</sup> Sess. §207(b)(2) (1995) (emphasis added), *reprinted in* 141 Cong. Rec. 94, S8064 (June 9, 1995). The House provision that also was rejected by the Conference Committee took a similar case-by-case approach to local media concentration. It would have added a new Section 337(c) to the Communications Act permitting the Commission, under certain circumstances, to consider concentrations of local media interests in proceedings to grant, renew, or authorize the assignment of station licenses. *See* 142 Cong. Rec. 13, H1121 (January 31, 1996), *reprinted in* 1996 U.S.C.C.A.N 10, 174-75; 141 Cong. Rec. 158, H9996-97 (October 12, 1995).

<sup>7/</sup> *See, e.g., Iowa Utilities Board v. FCC*, 120 F. 3d 753, 797 n.17, 802 (8<sup>th</sup> Cir., 1997) (FCC lacked jurisdiction to issue local telecommunications pricing rules and standards governing state commission determinations of exemptions and waivers, where legislative history revealed that Senate and House bill provisions expressly authorizing such powers were rejected by Congress in Conference Committee or otherwise); *Tyler v. United States*, 929 F. 2d 451, 456 n.8 (9<sup>th</sup> Cir. 1991); 2A

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direct the Commission to measure or to take into account the resulting radio advertising revenue shares accounted for by the acquiring party — as opposed to the number or percentage of stations — or grant the Commission any discretion to balance consideration of those factors against the station limits delineated in the statute.

Where Congress has told the Commission to count the number of stations (and, in the category of the smallest markets, *i.e.*, those having 14 or fewer stations, to count the percentage of stations), rather than to count revenue shares, it would be patently unreasonable to infer that Congress intended to have the Commission impose lower numerical station limits based upon revenue share levels.<sup>8/</sup> The whole structure of Section 202(b) compels the opposite construction, especially in light of the market-size and numerical station-limit groupings in the statute. It is clear that the

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<sup>7/</sup> (...continued)

*Sutherland Stat. Const.*, § 48.18 (5<sup>th</sup> ed. 1992) (“Generally, the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment”).

<sup>8/</sup> It is relevant that, prior to passage of the Telcom Act, Section 73.3555 of the Commission’s Rules expressly included a limit upon a single entity’s right to own or control more than 25% of the audience share in a local radio market. *See* 47 C.F.R. § 73.3555(a)(1)(ii) (1992); *see also In re Revision of Radio Rules and Policies*, MM Docket No. 91-140, *Report and Order*, 7 FCC Rcd 2755 (released March 12, 1992), *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (released August 5, 1992). It may be inferred that Section 202(b) eschewed the approach of the former Commission Rule, in that Section 202(b) expressly ordered the Commission to substitute limits based upon numerical station counts for limits based on audience shares.

local radio ownership provision ultimately enacted was considered to be a compromise between those in Congress who desired complete deregulation of radio ownership and those who were concerned about concentration in local markets and desired some limits.<sup>2/</sup>

The Commission's general authority to consider the "public interest, convenience and necessity" in acting upon assignment and transfer applications under Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. Section 310(d), does not provide an independent statutory basis or authority for the Commission to impose a stricter standard than is contemplated in Section 202(b) of the Telcom Act. Regardless of what discretionary authority the Commission may have possessed with respect to local concentration of radio ownership prior to the passage of Section 202(b) — by rulemaking or otherwise — such discretion cannot survive if it would be exercised to produce a result in conflict with Section 202(b)'s plain meaning. Since Congress has clearly expressed its desire to regulate local radio ownership diversity through its set of tiered-market numerical station limits, the Commission is not free to disregard that direction and to promulgate (either by rule or by case-by-case

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<sup>2/</sup> See, e.g., 142 Cong. Rec. 14, S700 (February 1, 1996). (Statement of Senator Burns) ("the radio ownership deregulation provision included in the [Conference Committee] report ... is a good compromise between those who wanted complete deregulation and those who were concerned about concentration in radio ownership in local markets").

adjudication) a different set of ownership limits, or limits based upon other measures of concentration.

**Cumulus's Experience is that Radio Station Ownership Consolidation  
in Mid-sized and Smaller Markets Benefits the Public Interest.**

Cumulus's acquisitions of radio stations have taken place almost exclusively in markets below the Top 100 markets. Cumulus's experience has been that the mid-sized and smaller markets have suffered from station ownership fragmentation and generally present an even more compelling case for the consolidation envisioned by Congress than the larger markets. <sup>10/</sup>

Section 202(b) of the Telcom Act's revision of the local radio ownership limits was designed, in part, to allow radio stations to achieve economies of scale within a market. A combination of five or six stations is often critical to achieving such workable economies. That is even more true in smaller markets than in larger

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<sup>10/</sup> According to data compiled by BIA, there are approximately 1,600 FM and 1,000 AM stations in the 168 U.S. radio markets ranked in Metropolitan Statistical Area Nos. 100-267. These 2,600 stations are owned by approximately 1,100 different operators. In addition, there are nearly 4,700 stations in unranked markets owned by approximately 2,700 operators. (These data were compiled from BIA Master Access program, BIA Publications, Inc.) Added to this myriad of independent radio operators is the competition provided by television, cable television, newspapers, magazines, outdoor advertisers, direct-mail advertisers, and Internet-based advertisers, among other media.

ones due to the high fixed cost structure of radio — even though a combination of five or six stations may result in proportionately higher advertising revenue shares in a smaller market than in a larger one. <sup>11/</sup> Congress no doubt took that into account in structuring the tiered-market statutory ownership limits to permit consolidation of station ownership in smaller markets. <sup>12/</sup>

To serve the public interest adequately and to achieve competitive viability in the marketplace, stations in smaller and mid-sized markets such as the ones in which Cumulus has chosen to operate must have several essential components. They must have adequate station management, programming, engineering, sales and sales support; they must devote the resources necessary to produce high-quality, locally-

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<sup>11/</sup> This may well explain, at least in part, the DOJ's challenges to many of the large-market radio mergers, where in attaining revenue shares in excess of 40 or 50 percent, the merging parties have often sought to combine eight of the highest-rated stations in a market, thereby exceeding the size and robustness of any group needed to achieve minimum scale economies.

<sup>12/</sup> *See, e.g.*, 141 Cong. Rec. 94 S8076 (June 9, 1995) (Statement of Senator Pressler) (noting that, following the Commission's 1992 liberalization of radio ownership restrictions, "[t]he economies of scale kicked in, stations gained financial strength in consolidation, and competing for advertising improved"); 141 Cong. Rec. 92, S7904 (June 7, 1995) (Statement of Senator Burns) (observing that radio ownership restrictions in smaller markets "handcuff broadcasters and prevent them from providing the best possible service to listeners in all of our States"); 141 Cong. Rec. 95, S8199-98 (June 12, 1995) (Statement of Senator Pressler) (decrying "use [of] Government regulation to avoid competition" and forecasting an "immense resurgence and . . . bursts of energy from new companies" in media following ownership deregulation).

originated programming; and they must employ the research, marketing, and management techniques needed to respond to listener and advertiser demands. If a station is not well equipped and managed, it is not likely to generate sufficient revenues to cover the necessary costs of investment in these essential elements — with the result that the needed investments are not made, the quality of programming and service to the community deteriorates, and the station loses advertiser support and viability in the market.

As this downward spiral has continued in many of the “Below 100” markets, some independent operators have found themselves forced into trying to “save their way into prosperity” by reducing station expenses to the bare minimum. Such reductions are usually achieved by cutting personnel and overhead in all functions, including engineering, programming, promotions, sales, and advertiser support. In the listener-critical area of programming, reducing expenses often means replacing on-air personalities and local content with “canned” satellite-delivered programming or computer automation. And while it may seem illogical to reduce sales expense and personnel, it is a typical practice among smaller-market operators stretched for cash. These types of marginal radio stations, which are typical in many of the smaller unconsolidated markets, are not a source of robust, inter-station competition or quality service to their communities.

Consolidating such smaller market stations under common ownership — and, in many cases, through co-location of some of their facilities — achieves significant reductions in infrastructure expenses unrelated to programming and advertiser services. These savings in substantial part make possible the necessary investments in programming and customer support to restore the stations to a position of competitive viability and adequate public service. The cost savings and additional investments enable the common owner to achieve significant product improvements that attract more listeners and make the stations more effective for advertisers. Under common ownership, the stations as a whole can spread out and broaden their overall appeal through an array of more numerous, narrower-focused radio “products” that are more responsive to the interests of both listeners and advertisers.<sup>13/</sup> As a result, radio can be revitalized in many smaller markets and be made more, not less, competitive in a way that truly benefits the public.<sup>14/</sup>

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<sup>13/</sup> As the FCC Staff Report recognizes, there is no general trend toward increased format concentration as a result of radio consolidation, and it may be economically efficient for one owner to offer advertisers a variety of formats. *See* FCC Mass Media Bureau, Policy and Rules Division, “Review of the Radio Industry, 1997,” MM Docket No. 98-35 (March 13, 1998), at §§ 3.2, 3.5, pp. 7, 11.

<sup>14/</sup> In conventional antitrust terms, the consolidation of ownership in these markets can thus generate “cognizable efficiencies” of substantial magnitude within the meaning of the 1997 amendments to the DOJ - FTC Horizontal Merger Guidelines. The efficiencies are “merger-specific” (*i.e.*, are unlikely to be accomplished in the absence of the consolidations), can be verified and quantified, and do not arise from any anticompetitive reduction in output or service. *See DOJ-FTC Horizontal Merger Guidelines* § 4 (rev. 1997). In most cases, the  
(continued...)

Cumulus's approach, when entering a new market, is to enhance the quality of radio for listeners and to strengthen the power, utility and effectiveness of the radio medium for advertisers through a number of specific measures which serve to increase, not reduce, competition, and otherwise serve the public interest. These measures include the following:

- Cumulus brings multiple stations under common ownership (wherever possible, co-locating the stations) to achieve necessary economies of scale and significant efficiencies through consolidation of facilities, installation of centralized accounting systems, enhanced utilization of certain corporate overhead and administrative functions, and other cost savings.
- The cost savings and efficiencies gained through consolidation and co-location are then used to help fund the increased investments in research, programming, and sales necessary to restore adequate service and the competitive viability of the stations.
- While achieving necessary efficiencies from common ownership and co-location, each station is also generally managed as a separate entity in terms of branding, programming content and management, spot inventory and pricing, and sales and sales management. Typically, each Cumulus station has its own programming and sales personnel, whose sole functions are to increase the attractiveness of that station to its listeners and advertisers, so that each such station stands alone and in effect competes against other Cumulus-owned stations in the same

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14/ (...continued)  
"output" of available radio advertising will be neither increased nor decreased, since the number of advertising slots for each station will generally remain the same before and after the consolidation.

market and often with the same customers, as well as with non-Cumulus stations and other media.

- Each Cumulus station employs extensive music testing, as well as market analysis and listener research, to refine station formats in order to ensure the best possible match of programming content to listener preferences, as well as to provide accurate demographic targeting and a range of choices for advertisers.
- Programming emphasis is placed upon replacing satellite-delivered programming with locally-originated content and live on-air personalities in the morning and during other daytime segments. Each Cumulus station also upgrades its physical distribution plant as needed to ensure only the highest-quality audio processing and signal transmission.
- Cumulus typically expands the size and effectiveness of each station's sales organization through active recruitment, in-depth training, and greater coverage of and responsiveness to potential advertisers in order to enhance local demand for the station's spot inventory.
- Each Cumulus station manages its own inventory of spot availabilities, and prices such spots based purely upon the supply of unsold spots versus advertiser demand. In other words, for a Cumulus station, advertiser demand ultimately sets the price of spots.

Cumulus' primary focus and operating strategy is thus to enhance each station's programming appeal — including both the quality and quantity of local programming as a means of enriching the listener experience — while benefitting from the infrastructure cost savings and efficiencies afforded by the joint operation of multiple stations and the better utilization of existing assets. The public interest is served by these efforts, not only because they lower costs and improve radio service,

but also because they dramatically improve the ability of radio in small and mid-sized markets to compete against the local newspaper and television stations, which in many cases have enjoyed near-monopoly status with respect to their service to major local advertisers.

The majority of the stations acquired by Cumulus had, prior to such acquisition, underperformed in the service provided to listeners and, as a result, had been less attractive to advertisers considering both radio and other media options. Cumulus believes that its strategy of combining multiple stations to reduce certain expenses, while employing research and live on-air talent to increase programming quality for listeners, and improving sales efforts to increase the number and scope of new advertisers, enables Cumulus' radio stations to compete more effectively with other local and regional media such as newspapers, cable television, and broadcast television stations.

Cumulus has employed this strategy in its markets, and it has worked well. That is illustrated by the following case studies of two markets — Abilene, Texas, which prior to Cumulus's arrival was unconsolidated, and Green Bay, Wisconsin, which was partially consolidated prior to Cumulus's entry.

**Abilene, Texas.** Abilene ranks as the 223rd-largest market in radio revenues, which are estimated at \$5.6 million. Cumulus has acquired, or is in the process of acquiring, four FM radio stations from four different sellers.<sup>15/</sup> In the market overall, the competitive climate has improved substantially — from two viable FM stations to eight, with higher-quality programming, more choice for listeners, and more choice for advertisers:

- ▶ Prior to the Cumulus acquisitions, only one of the four stations, KCDD (FM), employed a local programming staff. Stations KHXS (FM), KBCY (FM) and KFQX (FM) offered satellite-delivered programming and employed no local programming staff. One station had no sales personnel, the others had one sales person each.
- ▶ Today, each station has three dedicated sales professionals, increasing the total sales staff for the four stations from three to 12. A complete battery of market, audience, and music research was completed in the market. Each station now has, or shortly will have, a program director and live on-air talent in key segments.
- ▶ KBCY (FM), the Cumulus country-formatted station, has converted from being fully automated to having its own program director, a two-person morning show team, and a midday and an afternoon announcer. KHXS (FM) was launched as "The Bear" and moved from a 3.0% share of the age 12 and up audience to a 12.0% share in the Fall 1997 Arbitron. That was achieved by going from automation to a live morning show and by using research to guide the programming. An afternoon live announcer will join The Bear by the fourth quarter of 1998. Another of the stations, which was only recently acquired, will pursue the same strategy and will soon have its own program director and at least a live morning show.<sup>16/</sup>

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<sup>15/</sup> Cumulus has acquired KCDD (FM), Hamlin, Texas, KBCY (FM), Tye, Texas, and KHXS (FM), Abilene, Texas. Cumulus is in the process of acquiring KFQX (FM), Merkel, Texas, and, pending such acquisition, has entered into a Local Marketing Agreement with the current owner of the station, pursuant to which Cumulus provides certain programming, sales, and other services to KFQX (FM).

<sup>16/</sup> Audience shares as set forth in these case studies are based upon the Arbitron Company reports for the market for the indicated date. Revenue shares are based  
(continued...)

- ▶ Prior to the Cumulus entry into the market, the Abilene radio market was dominated by KEAN (FM), a country-formatted station with a Spring 1997 24.9% audience share and a 36% estimated revenue share. KEYJ (FM) followed with a Spring 1997 15% audience and 22% revenue share. All other stations and operators in the market were marginal. Since the Cumulus entry, KEAN (FM)'s share has dropped to 20.4% of the age 12 and up listeners, due primarily to competition from Cumulus' KBCY (FM). Meanwhile, KEYJ (FM) has dropped to an 8.9% audience share.
- ▶ Following Cumulus's entry into the market, Sunburst Broadcasting acquired KEAN (FM) and KEYJ (FM), as well as two other FM stations in the market. All of the Cumulus stations now compete with one another and with all of the Sunburst stations and the independent stations for advertising revenue.

**Green Bay, Wisconsin.** Green Bay ranks as the 140th-largest market in radio revenues, which are estimated at \$11.7 million. Since Cumulus's entry, the competitive climate has also improved substantially in this market, which had previously been dominated by Midwest Communications. Cumulus has enhanced the competitive environment in Green Bay by improving programming with live and local content, in order to give listeners more choices and more relevant product, while also providing advertisers a greater range of advertising options with live on-air personalities and promotions:

- ▶ In Green Bay, Cumulus acquired or is acquiring three FM radio stations from three different sellers: WOGB (FM), Kaukauna, Wisconsin, WEZR (FM), Brillion, Wisconsin, and WJLW (FM), Allouez, Wisconsin. Prior to the Cumulus entry, Green Bay was partially consolidated by Midwest Communications, with two FM stations and two AM stations generating a Spring 1997 30% audience share and a 62% revenue share.
- ▶ All three of the stations to be acquired by Cumulus in Green Bay were fully automated. The aggregate Spring 1997 audience share of these three stations was 2.5% and the revenue share was less than 5%. WOGB (FM), an oldies- formatted station, was broadcast from studios in the Fox River

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16/ (...continued)  
upon the BIA reports for the indicated markets.

Valley, some 50 miles south of Green Bay. The morning show was a simulcast from a sister Oshkosh, Wisconsin station (WVBO (FM)), and the rest of the station's day and night programming was delivered by a satellite music service. WJLW (FM) was a fully-automated country-formatted station, and WEZR (FM) was an automated jazz station with an outdated physical plant putting out a poorly-modulated signal. None of the stations used research or employed programming personnel. Each station had only a single sales person.

- ▶ Today, each station has three dedicated sales professionals and a sales manager, increasing the total sales staff for the three stations from three to 12.<sup>17/</sup> Each station now has or shortly will have a program director and live on-air talent in key segments. Extensive audience and music research was completed for the market and for each station. WOGB (FM)'s studios were moved to Green Bay (to a location within the station's predicted 70 dBu contour), and the station now has a live morning show, as well as live midday and afternoon programming. The research indicated that there was an unfilled need for a classic-rock station. WJLW (FM) changed formats to meet that need, and now has a two-person live morning show. WEZR (FM) was re-launched as "The Planet," an 80's-based adult-contemporary format, and now has a completely new physical plant and a live morning show.
- ▶ Cumulus expects to acquire a fourth station in the market in the near future, and expects the cluster of four stations to become a financially-viable group before the end of the year, providing significant competition to the Midwest Communications group. Each Cumulus station competes with one another, with all other stations, and with other media for advertising revenue.

Cumulus is pursuing a comparable strategy in all of its markets. Relying upon Section 202(b) of the Telecom Act, Cumulus assembles the full complement of stations in a market necessary for critical mass at the infrastructure and operational level. Then, each station is developed as a separate-branded entity in terms of

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<sup>17/</sup> Cumulus owns WOGB (FM) and is in the process of acquiring WEZR (FM) and WJLW (FM). Cumulus has a Local Marketing Agreement with each of the current owners of WEZR (FM) and WJLW (FM).

programming, spot inventory, pricing, and sales. Cumulus employs market analysis, audience research, and music testing to guide the programming on each station. In terms of personnel, redundant operations positions are eliminated in favor of additional personnel in programming, sales, and sales support. Cumulus also invests to upgrade the physical plant for the highest possible signal quality and reliability.

**The Commission Should Leave to the Expert Antitrust Enforcement Agencies the Task of Preserving Competition in Local Radio Markets.**

Turning to the Bureau's recent initiative that has frustrated and delayed Cumulus's acquisitions in several markets, Cumulus submits that much more is involved in an antitrust review of mergers and acquisitions than a mere recitation of estimates of market revenue shares. Under the analytical framework applied by the DOJ and the FTC, those antitrust agencies examine a host of interrelated factors in attempting to separate competitively-harmful mergers from the larger universe of mergers that are either competitively-beneficial or neutral. Those factors include:

- (i) whether the merger will create or enhance market power, either through unilateral action by the merged entity or through coordinated effects in the post-merger market;
- (ii) whether any supply-side responses, such as enhanced programming or re-formatting, are likely to ameliorate any competitive harm; (iii) whether the merger would produce efficiencies that may result in cost savings, improved product quality,